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Nos. 84-332/84-340

In The

Supreme Court of the United States

October Term, 1984

No. 84-332

AGENCY HOLDING CORPORATION, et al.,
Petitioners,

vs.

MALLEY-DUFF & ASSOCIATES, INC.,
Respondent.

No. 84-340

CROWN LIFE INSURANCE COMPANY, et al.,
Petitioners,

vs.

MALLEY-DUFF & ASSOCIATES, INC.,
Respondent.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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OPINIONS BELOW

The opinion of the United States District Court for Western District of Pennsylvania which is not reported is found in the Appendix filed by Petitioner Agency Holding Corporation at pp. 35a-38a. The opinion of the United States Court of Appeals for the Third Circuit is reported at 734 F.2d 133 (1984).

JURISDICTION

Jurisdiction is sought to be invoked pursuant to the provisions of 28 U.S.C. 1254(1).

COUNTERSTATEMENT OF THE CASE

The complex proof which plaintiff-respondent Malley-Duff & Associates, Inc. (hereinafter "Malley-Duff") presented at trial in support of its antitrust claim is correctly summarized in the opinion of Judge Aldisert for the United States Court of Appeals for the Third Circuit. 734 F.2d at 136-139, 142-144

The petitioners approach the facts in a widely divergent manner. Crown Life Insurance Company (Petition, pp. 3-9) recites its own version of the events, without even acknowledging Malley-Duff's proof. Agency Holding Company, on the other hand, purports to set forth Malley-Duff's contentions and, to some limited extent, does so.

As noted by the Court of Appeals, Mr. Clarke Lloyd operated on two levels, as a senior officer of Crown Life and as a participant in the Agency Holding group. Horizontally, together with Craig, the Agency Holding defendants, Ehrman, Ratini, Oglevee and others, he successfully eliminated competitors of his company, Agency Holding, and took over the distribution of Crown products in Illinois, Northern Ohio, Western Pennsylvania, Colorado, Arizona, New England and New Jersey. Since

most of these territories had one or more incumbent agents, he used his vertical power as Senior Vice President of Crown Life to terminate the incumbents, to appoint his own company as successor and to provide disparate "financial aid" from Crown Life which Lloyd and Craig then used for personal and business purposes.

Malley-Duff fell a victim of this scheme. Its Southwestern Pennsylvania territory was not exclusive. It competed, primarily on service,[1] with the Ehrman Agency, and Lloyd, Craig and the Agency Holding defendants planned to open a third office in Pittsburgh. Lloyd and Craig caused Crown to place a quota on Malley-Duff in August, 1977 covering the year ended December 10, 1977, i.e., with less than one-fourth of the year remaining. Agency Holding, Lloyd and Craig arranged to purchase the Ehrman Agency with the funds Lloyd got from Crown. When the quota was not met, Malley-Duff was terminated by Lloyd who then appointed his own company as successor and merged its business with the Ehrman Agency. Lloyd and Craig thus obtained sole possession of the market in the Pittsburgh territory. Lloyd carried out his activities with Craig and Agency Holding unbeknownst to Crown. However, Crown has never repudiated his behavior since it came to light.

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[1]State law prohibited competition on the basis of price, and the primary method of competition was through the provision of services.

REASONS WHY THE WRIT SHOULD BE DENIED

1. Copperweld was not considered by the Third Circuit and does not apply to these facts

Inspired by this Court's recent decision in *Copperweld Corp. v. Independent Tube Corp.*, 104 S. Ct. 2731 (1984), petitioners Crown Life and Lloyd argue that respondent alleged a mere bathtub conspiracy, an issue not raised in or decided by the Third Circuit. Petitioners' attempt to raise an issue before this Court that was never considered by either court below is, of course, untimely. But even if it had been timely raised, petitioner's analogy to *Copperweld* fails for three reasons.

First, defendants did not share an intracorporate relationship. Agency Holding was not a subsidiary of Crown Life. It was owned by Lloyd and Craig. Far from owning Agency Holding, Crown Life itself investigated and could not determine the identity of the majority shareholder. 734 F.2d at 139. It strains credulity to argue that a unity of economic interests existed since Crown Life did not know of Lloyd's activities with Craig and Agency Holding and many of Agency Holding's actions were contrary to Crown Life's interests. Crown Life, therefore, may not exclude the possibility of conspiracy by relying on *Copperweld*, where a parent-wholly owned subsidiary relationship obtained.

Second, petitioners may not hide behind the fact that some of the defendants were officers of Crown Life. These same defendants were simultaneously acting on their own behalf and as owners of Agency Holding. While "officers of a single firm are not separate economic actors pursuing

separate economic interests," *Copperweld,* 104 S. Ct. at 2741, individuals who act on their own behalf or who serve as officers of two unrelated entities are quite capable of conspiring with one entity while acting on behalf of the other. *See, e.g., H&B Equipment Co. v. International Harvester Co.,* 577 F.2d 239, 244 (5th Cir. 1978); *Greenville Publishing Co. v. Daily Reflector, Inc.,* 496 F.2d 391 (4th Cir. 1974). From the evidence presented in these cases, a jury could have reasonably concluded, as the court below observed, that Craig acted on behalf of Agency Holding; that Lloyd served in a dual capacity as officer of Crown Life and a person interested in Agency Holding; and that they were capable of conspiring with each other, with Agency Holding and with Crown Life. 734 F.2d at 142-43.

Moreover, players other than officers of Crown Life participated in this conspiracy. Early in the conspiracy, Craig resigned from Crown Life. 734 F.2d at 138. Bruce Pennamped, a private attorney in Indianapolis, Indiana, with no connection to Crown Life, incorporated Agency Holding and served as the nominal head of that corporation during part of the conspiracy. Another individual, Robert Oglevee, conspired with the other defendants to eliminate Malley-Duff and to take over the Ehrman Agency. The presence of these indivduals who, acting in furtherance of their individual interests, were detached from the Crown Life corporate family, negates any inference that the characters to this conspiracy were acting with a unity of economic interests. *Cf. Copperweld,* 104 S. Ct. at 2741.

Finally, even if the conspiracy would be deemed intracorporate, the illegal nature of the creation of Agency

Holding removes this case from the rule established in *Copperweld*. Where the corporate subsidiary is formed for the very purpose of executing an illegal scheme, a violation of §1 is established. *Copperweld,* 104 S. Ct. at 2731, citing *United States v. Yellow Cab Co.,* 332 U.S. 218 (1947). The anticompetitive purpose of the founders of Agency Holding is clear: to eliminate Malley-Duff as a competitor to the newly formed Agency Holding affiliate. As the Court below characterized the product of the conspiracy: the "result was a pincers movement: to mortally wound Malley-Duff and at the same time to replenish the coffers of Agency Holding, the mega-insurance agency that directly or indirectly was to replace Malley-Duff." 734 F.2d at 143.

2. The Courts of Appeals are in agreement on the treatment of classic group boycotts

This case is not a typical distributor-termination case in which nonprice restrictions over territories are judged under the rule of reason. In typical cases, the manufacturer's strategy and efforts to compete in the inter-brand arena are given weighty consideration. In the instant case, Crown Life was not attempting to improve its competitive posture; the purpose of the conspiracy, instead, was to drive Malley-Duff out of business and thereby eliminate all competition from it. The Court below found that Malley-Duff produced sufficient evidence of a classic group boycott to warrant jury consideration. 734 F.2d at 142-43. Under the Third Circuit's strict construction of the group boycott theory, a *per se* violation exists when there is "a purpose . . . to exclude a person or group from the market. . . ." 734 F.2d at 141-42; *Larry V. Muko, Inc. v. South-*

west Pennsylvania Building and Construction Trades Council 670 F.2d 421, 430 (3d Cir.), *cert. denied* 459 U.S. 916 (1982); *DeFilippo v. Ford Motor Co.*, 516 F.2d 1313, 1318 (3d Cir), *cert. denied*, 423 U.S. 912 (1975). Here, the Court found just such an agreement in the efforts of Lloyd, Craig, Agency Holding and Ehrman.

The decision of the Court below that an agreement to drive an entity out of the market is illegal follows this Court's decision in *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962). Although no allegation of price competition was made in *Poller*, this Court determined that a conspiracy between a network and a broadcaster to eliminate another broadcaster from the market stated a cause of action under Section 1. Like the Third Circuit in *Malley-Duff, Larry V. Muko, Inc. and DeFilippo*, other Courts of Appeals have followed the teaching of *Poller* that conspiracies that have as their sole purpose the elimination of an entity from a business market is the type of pernicious conduct that is illegal *per se*.

The Seventh Circuit, which petitioners argue is squarely in conflict with the Third, has held that a boycott aimed at influencing the supply of a product must be analyzed under the *per se* rule. *Marrese v. American Academy of Orthopaedic Surgeons*, 726 F.2d 1150, 1155 (7th Cir.) (en banc), *cert. granted*, 104 S. Ct. 3553 (1984); *Phil Tolkan Datsun, Inc. v. Greater Milwaukee Datsun Dealers' Advertising Association, Inc.*, 672 F.2d 1280 (7th Cir. 1982). Clearly the elimination of major competitor is an attempt to destroy a line of supply and require all purchasers to deal on whatever terms are available from the conspirators. *Accord, Fount Wip, Inc. v. Reddi-Wip, Inc.*, 568 F.2d 1296,

1301 (9th Cir. 1978) ("If defendants did conspire to drive Lapin out of business, then a combination in restraint of trade existed which fits within the plain words of the statute.").

The cases cited by petitioners as conflicting with the decision below did not involve blatant conspiracies to eliminate business entities. They are further distinguishable from this case because they did not involve a conspiracy among competitors.

In *Oreck Corp. v. Whirlpool Corp.*, 579 F.2d 126 (2d Cir.) (en banc), *cert. denied*, 439 U.S. 946 (1978) the Second Circuit rested its application of the rule of reason on the fact that only a vertical conspiracy between a single supplier and a single distributor existed. *Id.* at 131. Had an agreement existed among competitors to exclude Oreck from the market, the Second Circuit acknowledged that the *per se* standard would have been appropriate. *Accord, Packard Motor Car Co. v. Webster Motor Car Co.*, 243 F.2d 418 (D.C. Cir. 1957) (agreement between single supplier and single retailer); *JBL Enterprises, Inc. v. Jhirmack Enterprises, Inc.*, 698 F.2d 1011 (9th Cir.), *cert. denied*, 104 S.Ct. 106 (1983). (No allegation of conspiracy involving *any* entity on same competitive level as terminated distributor); *Bostick Oil Co. v. Michelin Tire Corp.*, 702 F.2d 1207 (4th Cir.), *cert. denied*, 104 S.Ct. 242 (1983) (no evidence that competitors had agreed with each other to work toward termination; nevertheless, the Court recognized that "where the facts support a finding that competing distributors provoked a manufacturer to eliminate one of their number as a marketplace competitor, there is no need to proceed to the more finely tuned 'rule of reason' analysis." *Id.* at 1216).

Even the decision of the Seventh Circuit in *Products Liability Insurance Agency, Inc. v. Crum & Forster Insurance Cos.*, 682 F.2d 660 (7th Cir. 1982) is not to the contrary. The Court expressly noted that it was not a case where a multiple number of actors on the same competitive level as the targeted company were involved. *Id.* at 663. The Seventh Circuit in *Products Liability* intimates, and other decisions of the same court state, that horizontal agreements such as the one in this case would be subjected to the *per se* test, *Spray-Rite Service Corp. v. Monsanto Co.*, 684 F.2d 1226, 1235 n.4, *reversed on other grounds*, 104 S. Ct. 1464 (1984); *Phil Tolkan Datsun, Inc. v. Greater Milwaukee Datsun Dealers' Advertising Association, Inc.*, 672 F.2d 1280 (7th Cir. 1982).

More importantly, this Court's decision in *United States v. General Motors Corp.*, 384 U.S. 127 (1966) clearly establishes that the *per se* rule applies when competitors band together and conspire to induce a single supplier to take action against one of their competitors. The fact that only a single supplier can take the anticompetitive act does not render the action unilateral as petitioners Crown Life and Lloyd suggest [Brief at 11-12] nor does it transform a horizontal conspiracy into a vertical one, as petitioners Agency Holding and Craig suggest [Brief at 7]. Rather, "where businessmen concert their actions in order to deprive others of access to merchandise which the latter wish to sell to the public, we need not inquire into the economic motivation underlying their conduct." 384 U.S. at 146.

The critical distinctions between Malley-Duff and all of the cases cited by petitioners as conflicting are the absence of an agreement to eliminate a supplier of goods

from the marketplace and the presence of multiple actors, e.g., Agency Holding, Craig and Ehrman, on the same competitive level who conspired to eliminate Malley-Duff from the market. The Courts of Appeals do not disagree on the applicability of the *per se* rule to agreements such as this. This Court does not search for a conflict when the facts of a case make it reconcilable with accepted precedents in all Courts of Appeals. *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955).

3. The Court of Appeals' opinion does not contravene Monsanto Co. v. Spray-Rite Service Corp.

The termination of the Malley-Duff agency resulted from a classic group boycott. As the Court below found, there was sufficient evidence to support a jury finding that direct competitors of Malley-Duff—Craig, Lloyd, Agency Holding and Ehrman—conspired to eliminate Malley-Duff from the market. As this Court has long recognized, a "group boycott of even a single trader violate[s] [Section 1] without regard to the reasonableness of the conduct in the circumstances. Group boycotts . . . are among those 'classes of restraints which from their nature or character' were unduly restrictive." *United States v. General Motors Corp.*, 384 U.S. 127, 145-46 (1966), *quoting Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 211 (1959).

This Court has also recognized that restrictions that originate in agreements among competitors of the targeted entity are horizontal in nature and trigger the *per se* rule. *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 58 n.28. The boycott in this case was the brainchild of Lloyd, and included among others, Craig, Oglevee, the

Ehrman Agency, Pennamped and two Agency Holding corporations.

Monsanto Co. v. Spray-Rite Service Corp., 104 S. Ct. 1464 (1984) did not involve a conspiracy that originated among direct competitors of the targeted company. Individual competitors may have complained to the manufacturer, but no evidence demonstrated that they had agreed among themselves to induce the manufacturer to terminate the distributor. Here, by contrast, the direct competitors hatched their idea of taking over the market by driving Malley-Duff out of business and accomplished their illegal end through Lloyd who acted both as direct competitor and agent from Crown Life. Where, as here, the anti-competitive purpose and the resulting effects can be realized on the competitor level, the concerns of purely vertical restraints such as the one in *Spray-Rite* need not be addressed.

Moreover, the peculiar fact pattern of this case makes it an undesirable forum for deciding whether a group boycott must be motivated by price-fixing in order to trigger the *per se* rule. This conspiracy occurred within an industry where price is not a variable; rates are set by state regulatory agencies. The "central nervous system" of this highly regulated competitive format, then, cannot be price. The quality of services provided to consumers, however, may vary greatly within the system and is a basis for choosing one supplier over the other. A customer deprived of competition on the basis of quality is no less cheated of the benefits of a free-market system than one who is deprived of competition based purely on price, especially when state law prohibits price competition. The key consideration in boycott cases must be detriment; if

the customer in a regulated market is denied the benefits of competition in the only area untouched by regulation—service, the effect is as pernicious and anti-competitive as price-fixing in the traditional, unregulated model. As this Court stated in *General Motors, supra:* "Nor do we propose to construe the Sherman Act to prohibit conspiracies to fix prices at which competitors may sell, but to allow conspiracies or combinations to put competitors out of business entirely." 384 U.S. at 148.

4. The unusual facts of the case, the academic nature of Petitioners' concerns and the interlocutory state of the proceedings all counter-indicate the grant of certiorari

Unlike most dealer termination cases, the instant matter involved a complex scheme whereby Lloyd, an officer of Crown, was simultaneously acting for Crown and for his "ulterior cross purpose" with Agency Holding. 734 F.2d at 143. The cross-purpose involved not only ousting the existing marketers for Lloyd and his conspirators' benefit, but then looting Crown Life via a series of loans authorized by Mr. Lloyd himself. Crown Life did not know how much of its money Lloyd had lent to Lloyd's companies but believed the amounts to be between $5,000,000 and $8,000,000. Crown Life also did not know how much of the loans could be repaid or collected. These Byzantine transactions are far from the ordinary and recurring termination cases where the supplier's action is unilateral or suggested by competing dealers. The scenario of Malley-Duff is unlikely ever to recur.

In addition, petitioners expressly seek to involve this Court in an academic debate concerning economics and how to distinguish vertical from horizontal restraints. This

Court does not sit to resolve such matters nor should it be drawn into a factually dense area of law where any general rule of law enunciated would, in any case, allow for minor variations in application.

Finally, it should be noted that the mandate of the Court of Appeals is wholly interlocutory in that a new trial was ordered on the anti-trust issue as well as the state law questions. Consequently, there will be a new trial in any event and this factually unique case might be disposed of below without the necessity of a ruling by this Court.

CONCLUSION

For the foregoing reasons, Respondent, Malley-Duff & Associates, Inc. respectfully suggests that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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